THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT **No. 05-E-0257**

City of Nashua

v.

State of New Hampshire

ORDER

This is a Petition for a Declaratory Judgment by the City of Nashua ("the City") against the State of New Hampshire ("the State") seeking a determination that RSA 76:3 and RSA 198:38 through RSA 198:49, as amended by House Bill 616 ("HB 616"), violate the New Hampshire Constitution. On December 13, 2005, the matter came before the Court for a final hearing. For the reasons set forth herein, the Court GRANTS the petition in part and finds that RSA 76:3 and portions of RSA 198:38 through RSA 198:49, as amended by HB 616, are unconstitutional.

Background

Prior to the enactment of HB 616, RSA 76:3 provided for a State Education Property Tax and RSA 198:38 through RSA 198:49, in general, provided for an education trust fund, for the determination of the cost of an adequate education, and for the determination and distribution of adequate education grants. These statutes were enacted by the Legislature in order to fund the State's obligation to provide a constitutionally adequate public education for its citizens in accordance with the New Hampshire Supreme Court's decisions in Claremont School Dist. v. Governor,138 N.H.

183 (1993) (hereinafter Claremont I), and Claremont School Dist. v. Governor, 142 NH 462 (1997) (hereinafter Claremont II).

The City claims that HB 616 is unconstitutional on its face because it fails to determine or provide a methodology for determining the cost of an adequate education. Further, the City argues that HB 616 provides for transition grants which result in the levying of disproportional and unequal taxes in violation of part II, article 5 of the New Hampshire Constitution. The City also maintains that HB 616 uses certain 2003 and 2002 data in its funding calculations which are not permitted by the statute. In addition, the City claims that the use of this statistical data from 2003 and 2002 in its funding calculation is unconstitutional. Finally, the City argues that HB 616 is unconstitutional as applied to the City of Nashua because the funds it receives under HB 616 are insufficient to fund an adequate education.

For the applicable law in this case, the Court need look no further than the decisions of the New Hampshire Supreme Court in Claremont I and its progeny. In accordance with these decisions, the Court must determine whether HB 616 meets the State's duty to provide a constitutionally adequate public education to New Hampshire children. In doing so, it will not be necessary for the Court to determine what that duty is or what State obligations are encompassed by that duty, as the Supreme Court has already done so.

In Claremont I, the Supreme Court held "that part II, article 83 [of the New Hampshire Constitution] imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and

to guarantee adequate funding." 138 N.H. at 184. Subsequently, in Claremont II, the Supreme Court held "that the property tax levied to fund education is, by virtue of the State's duty to provide a constitutionally adequate public education, a State tax and as such is disproportionate and unreasonable in violation of part II, article 5 of the New Hampshire Constitution." 142 N.H. at 466. The Supreme Court stated that "[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." Id. at 471. The Court reiterated that "[t]he responsibility for ensuring the provision of an adequate public education and an adequate level of resources for all students in New Hampshire lies with the State." Id. at 475-76.

Standard of Review

Generally, the Court's review of whether a legislative act is unconstitutional, "is premised on the rule that [t]he constitutionality of a legislative act is to be presumed, and a statute is not to be held unconstitutional unless a clear and substantial conflict exist[s] between it and the constitution." Petition of Governor and Executive Council, 151 N.H. 1, 4 (2004) (quotations and citations omitted). A statute "will not be declared invalid except upon [i]nescapable grounds." Id. (quotation and citation omitted).

However, the New Hampshire Supreme Court has determined that "a constitutionally adequate public education is a fundamental right." Claremont II, 142 N.H. at 473. "[T]he right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the

public to enforce the State's duty." Id. (quotation and citation omitted). "When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny." Id. at 472. Under this standard, the Court must find "a compelling state interest to sustain the legislation." Id. (quotation and citation omitted).

The State argues that strict scrutiny is not the proper standard of review to apply in this case and urges the Court to apply the presumption of constitutionality standard of review. The State maintains that strict scrutiny does not apply because the City has failed to offer any evidence that governmental action has impinged the public's fundamental right to a constitutionally adequate education. The Court is not persuaded by this argument. In this case, the City claims that HB 616 violates the State's constitutional duty to fund an adequate public education. By its nature, this duty is inextricably linked to the public's fundamental right to a constitutionally adequate public education. Thus, the Court finds and rules that the State must satisfy the heightened standard of review of strict scrutiny in this case.

Analysis

Adequate Education

The City claims that HB 616 is facially unconstitutional because it obligates the State to provide an equitable education rather than an adequate one. The City argues that the statute does not provide for any determination of the cost of an adequate education and, therefore, the State has failed to satisfy its constitutional duty to fund an adequate public education for the children in this State as encompassed within the duty

delineated by the New Hampshire Supreme Court. The State asserts that HB 616 satisfies the State's duty as it guarantees the funding for a constitutionally adequate education.

Prior to the enactment of HB 616, RSA 198:38 through 198:49 was entitled "State Aid for Educational Adequacy; Education Trust Fund." RSA 198:40 provided for a determination of per pupil adequate education costs and adequate education grants by means of a complex formula which in essence considered, among other factors, certain educational costs in certain school districts and average daily membership in attendance. See also HB 616, ¶ 1. The statewide cost of an adequate education per pupil was determined in accordance with the formula, and adequate education grants to municipalities were determined using the average cost per pupil and the weighted average daily membership in residence for the municipality, plus other adjustments. RSA 198:40. The education grants were funded by an education property tax as enumerated in RSA 76:3, and a State grant from other sources. If the amount raised in a municipality by the state education property tax exceeded a municipality's cost of an adequate education, the excess was remitted to the State, and was used to fund grants to those municipalities in which the state education property tax failed to provide a sufficient amount to fund the cost of an adequate education. See RSA 198:46. The cost of an adequate education for future years was determined by applying an inflation factor to the adequate education cost per pupil determined for the first year.

HB 616 repealed RSA 198:40, and replaced it with RSA 198:40-a, b, and c, which provide for "Local Tax Capacity Aid," "Targeted Per Pupil Aid," and "Statewide

Enhanced Education Tax Capacity Aid," respectively. These three aid grants constitute the total education grant for each municipality. Each type of aid is calculated differently and all towns do not receive all types of aid under the eligibility requirements for each component. See RSA 198:40-a (Supp. 2005); RSA 198:40-b (Supp. 2005); RSA 198:40-c (Supp. 2005). Aid is limited to those municipalities with the greatest "need." See RSA 198:40-a,b,c. The Legislature has determined "need" based on a municipality's ability to raise revenue for its schools. See id. This is measured by the municipality's equalized valuation per pupil. See id.

A municipality receives local tax capacity aid if its local equalized valuation per pupil, including utilities, is less than the statewide average equalized valuation per pupil. RSA 198:40-a, III(b) (Supp. 2005). Targeted aid provides aid for educationally disabled students, students eligible for free or reduced-price meals, students with a limited proficiency in English, and for transportation costs. RSA 198:40-b, I (Supp. 2005). A municipality qualifies for targeted aid if the local equalized valuation including utilities per pupil is less than or equal to 150 percent of the statewide average equalized valuation per pupil, and the municipality's median family income is less than or equal to 150 percent of the State average median family income. Id. Statewide enhanced education tax capacity aid is determined by a formula similar to the formula used to determine local tax capacity aid. RSA 198:40-c, III (b) (Supp. 2005). However, aid is restricted to those municipalities having an equalized valuation per pupil, excluding utilities, that is below the statewide average equalized valuation per pupil. Id. The total

education grant is determined solely on the basis of equalized property valuation and, with regard to targeted aid, median family income. RSA 198:41, I (Supp. 2005).

The statute no longer provides for a calculation of the cost of an adequate education, per pupil or otherwise. Rather, RSA 76:3 has been amended to provide for a Statewide Enhanced Education Tax ("SEET") to be set at a level sufficient to generate revenue of $363,000,000. RSA 76:3 (Supp. 2005). There is no provision for any increase in this revenue for subsequent years. As under the prior statute, an education trust fund is created into which the proceeds of various State taxes and funds are deposited. RSA 198:39, I (Supp. 2005). The education trust funds are to be used for education grants to municipalities under RSA 198:42. Id. If the SEET to be raised by a municipality exceeds the amount the municipality spent for schools from both the state and local education property tax for fiscal year 2003, the municipality must remit the excess to the State. See RSA 198:41, II (Supp. 2005) and RSA 198:46, I (Supp. 2005). The total amount of State revenue to be used for education for fiscal year 2006 including SEET is $835,671,140.00. See Resp't's Ex. B.

In Claremont School Dist. v. Governor (Accountability), 147 N.H. 499, 505 (2002), the Supreme Court adopted the State's assertion that Claremont II issued "four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." (quotations omitted). These four mandates collectively constitute the State's duty to provide a constitutionally adequate public education. Here, the State appears to argue that its duty is simply to provide a constitutionally adequate education and to guarantee adequate funding. However, the

Supreme Court has made it clear in its decisions that the State's duty is not merely to provide and fund a constitutionally adequate education but that it must meet all of these four mandates as each one is an integral part of the duty of the State to provide a constitutionally adequate education. See generally id.

While the Court declined in Claremont School Dist. v. Governor (Motion for Extension of Deadlines), 143 N.H. 154, 160 (1998) to determine whether the definition of an adequate education adopted by the State was facially constitutional, it has consistently made clear that defining and implementing a constitutionally adequate education are an integral part of the State's duty. See Claremont I, 138 N.H. at 192-93; Claremont II, 142 N.H. at 475; Claremont School Dist. v. Governor (Motion for Extension of Deadlines), 143 N.H. at 159-160; Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999); Claremont School Dist. v. Governor (Accountability), 147 N.H. at 508, 519-20 (2002). "While the judiciary has the duty to construe and interpret the word education by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word, and to the programs it deems necessary to provide that education within the broad guidelines." Claremont II, 142 N.H. at 475 (quotation and citation omitted) (emphasis added). In Claremont School Dist. v. Governor (Accountability), supra the Court specifically held that accountability is also an essential component of the State's duty. 147 N.H. at 500.

> Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is

> possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.

Id. at 508 (citations omitted). The Court reasoned that "[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty." Id. at 509 (citation omitted).

"It is not possible to determine the level of funding required to provide the children of this state with a constitutionally adequate education until its essential elements have been identified and defined." Opinion of the Justices (Reformed Public School Financing System), 145 N.H. 474, 478 (2000). In order for the State to fulfill its duty to provide a constitutionally adequate education, the Legislature must, in addition to specifically and substantially defining an adequate education, provide a reasonable method to determine what an adequate education will cost. Thus, it is clear that the mandate that the State determine the cost of an adequate education is an essential element of the State's duty to provide a constitutionally adequate education.

The Court recognizes, as did Justice Horton, in his dissent in Claremont II, that

> 'Constitutional adequacy' is not 'general adequacy.' The former must be determined by a careful reading of our constitution. The latter may be important to the maker's of policy, but it is clear that one man's adequacy is another's deficiency. Under our system of government, the elected representatives of the people must strike the balance.

Claremont II, 142 N.H. at 478 (Horton, J. dissenting). Intelligent men and women may certainly differ as to what constitutes an adequate education and how to determine its cost, and there is undoubtedly a wide spectrum of such definitions which result in an equally wide spectrum of methods to determine its cost.

As noted above, the Supreme Court has repeatedly acknowledged that it is the prerogative of the Legislature and the Executive Branch to develop the criteria for an adequate education, to provide a determination of its cost, to determine the mechanism of funding and to establish accountability. "The [L]egislature and the Governor have broad latitude to fashion the specifics. Once this critical task has been completed, it is for the [L]egislature to adopt a funding mechanism to ensure that a constitutionally adequate education is provided." Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 478.

The Supreme Court has clearly indicated "that constitutional adequacy [does not] require[] a uniform expenditure per pupil throughout the State." Id. In fact, the Court has conceded that "the cost of a constitutionally adequate education may not be the same in each school district." Id. (citation omitted). The Supreme Court has "never directed or required the selection of a particular funding mechanism." Id. However, while "there are many different ways that the Legislature could fashion an educational system while still meeting the mandates of the constitution," Claremont School Dist. v. Governor (Accountability), 147 N.H. at 518 (quotation omitted), whichever way the State chooses, the Supreme Court has ruled that the State has a duty to provide a constitutionally adequate education, and one of the essential components of that duty is to determine the cost of an adequate education as defined by the Legislature. While great latitude must be granted to the Legislature to develop a formula or methodology to compute that cost, it must fulfill its duty by, in fact, determining the cost in accordance

with its definition of an adequate education. The Court finds and rules that in HB 616, the Legislature has abdicated its duty.

HB 616 arbitrarily establishes an amount to be dedicated to providing an adequate education. It does not establish in any rational way what an adequate education, as the Legislature reasonably defines it, will cost. It merely provides what it terms an "equitable" manner in which to distribute the funding to municipalities that is essentially based solely on the equalized valuation of each municipality. In other words, the “equitable manner” is based upon each municipality’s ability, or lack thereof, to raise sufficient funds through its property tax to provide an adequate education for its children. However, the distribution of funds to each municipality, no matter how equitably it is accomplished, does not in any way ensure that an adequate education is provided. The Supreme Court has noted that “[t]he constitution mandates statewide adequacy — not statewide equality.” Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 478.

The Legislature has made no provision whatsoever in HB 616 to determine the cost of an adequate education. Rather, it has arbitrarily set the amount which it is willing to dedicate to the task of providing an adequate education. The State argues that it has dedicated $835,671,140.00 (Resp’t’s Ex. B) to the statewide cost of an equitable education, which is a considerable sum, and, that it has provided approximately 60.7 percent of the actual cost of operating the City of Nashua schools in fiscal year 2006. See Resp’t’s Ex. J. The State maintains that the contribution of such amounts to fund education must be considered "adequate.”

The State also cites to an article by Professor Briffault from Columbia Law School, entitled The Relationship between Adequacy and Equity, and to the testimony of Lyonel Tracy, Commissioner of the Department of Education, that "equitable" is a higher standard than "adequate," to support its argument that HB 616 in fact provides the highest level of adequacy. The Court does not find these sources compelling. The duty imposed on the Legislature by the Constitution, however, is not to "adequately fund" education, but to totally fund "a constitutionally adequate education." Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 477-78 (citations omitted) (emphasis in original and added). Indeed, had the Supreme Court intended for the State's duty to merely encompass providing "adequate" funds for an education, it could have done so. See, e.g., McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (finding that "there ha[d] been no legislative disregard of the constitutional command that the state provide an adequate education for its citizens" as the "state's financial commitment to public education is massive -- currently in excess of one billion dollars per year").

By failing to determine the cost of an adequate education, the Court is unable to determine whether the State's duty is met no matter how much it appropriates. Given that the State has failed to determine the cost of an adequate education, it is not possible to determine whether the amount provided by the State to each municipality is sufficient to totally fund an adequate education in the respective municipality. It is not for the municipality to determine whether the amount allocated is sufficient to totally fund an adequate education. "Part II, Article 83 [of the New Hampshire

Constitution] … imposes upon the State the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of this constitutional responsibility to local communities … ." Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 476.

As discussed above, the duty to provide an adequate education imposed by our Constitution is defined by its essential components as expressed by the Supreme Court. If the State fails to provide these essential components to the level of its constitutional duty, it has failed to fulfill its duty. If the State is permitted to determine the cost of an adequate education simply by the amount of funds it is willing to provide to fulfill that duty, "the duty creates no obligation, and is no longer a duty." Claremont School Dist. v. Governor (Accountability), 147 N.H. at 509 (citation omitted).

The Court notes that the State has failed to fulfill its duty to determine the cost of an adequate education not because it has chosen to label its State grants "Equitable Grants" rather than "Adequacy Grants," or because it has chosen not to define an adequate education on a per pupil basis. Rather, the State has failed in its duty because it has failed to determine in any meaningful way the cost of an adequate education. As a result, it cannot be established that the State is fulfilling its duty to provide the total cost of a constitutionally adequate education to every municipality in the State.

Transition Grants

The City claims that RSA 198:41, as amended by HB 616, results in disproportional and unequal taxes to fund the cost of an adequate education, and is

therefore unconstitutional. Prior to its amendment by HB 616, RSA 198:41 provided for the amount of the adequate education grants to each municipality by a formula based on the product of the average base cost per pupil of an elementary pupil and the weighted average daily membership in residence for the municipality, plus 70 percent of the municipality's apportioned transportation cost, minus the amount of the education property tax warrant for the municipality. RSA 198:41, I. As amended by HB 616, RSA 198:41 provides that the education grants to municipalities shall be the total of the local tax capacity aid (RSA 198:40-a), the targeted per pupil aid (RSA 198:40-b), and the statewide enhanced education tax capacity aid (RSA 198:40-c), plus, if applicable, a "transition grant" which will bring a municipality's education grant to an amount equal to 85 percent of the education grant for a particular prior fiscal year. RSA 198:41, I (Supp. 2005).

Specifically, in the fiscal year beginning July 1, 2005, if the total of a municipality's local tax capacity aid, targeted per pupil aid, and statewide enhanced education tax capacity aid is less than 85 percent of the education grant determined for the municipality for fiscal year beginning July 1, 2004, under the version of RSA 198:41 prior to its amendment by HB 616, the municipality will receive a transition grant in an amount to increase its education grant to 85 percent of the education grant it received in 2004. RSA 198:41, I (b)(1) (Supp. 2005). For fiscal year beginning July 1, 2006, the education grant would be the same amount as determined for fiscal year 2005. RSA 198:41, I(b)(2) (Supp. 2005). For fiscal year beginning on July 1, 2007, if a municipality's total local tax capacity aid, targeted per pupil aid, and statewide enhanced

education tax aid is less than 85 percent of the municipality's total education grant, including any transition grant, for the prior fiscal year, then the municipality will again be entitled to a transition grant in an amount to increase its education grant to 85 percent of the education grant determined for the municipality for the fiscal year beginning July 1, 2006. RSA 198:41, I(c)(1) (Supp. 2005). Finally, for the fiscal year beginning July 1, 2008, the education grant for a municipality shall be the same amount as determined for fiscal year 2007. RSA 198:41, I(c)(2). These transitions grants will cease after fiscal year 2008.

In Claremont II, the Supreme Court held that "[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." Claremont II, 142 N.H. at 471. Subsequently, in Opinion of the Justices (School Financing), 142 N.H. 892 (1998), the Supreme Court addressed the issue of whether a property tax abatement scheme, included in proposed school financing legislation, would violate Part II, Article 5 of the New Hampshire Constitution requiring that all taxes be proportional and reasonable and whether it would violate the constitutional requirement that the tax be administered in a manner that is equal in valuation and uniform in rate throughout the State. The proposed legislation provided for a "'special abatement' for [t]he amount of state education tax apportioned to each town … in excess of the product of the statewide per pupil cost of an adequate education … times the average daily membership in residence for the town." 142 N.H. at 899 (quotation and citation omitted). The "special abatement" was "designed to protect towns from

financially contributing to the adequate education of children in other towns or school districts." Id. at 901.

The Court found that the abatement scheme caused "the effective tax rate [to be] reduced below the uniform State education tax rate in any town that c[ould] raise more revenue than it need[ed] to provide the legislatively defined 'adequate education' for its children." Id. at 899. As a result, the tax was not uniform in rate because "clearly some taxpayers would pay a far higher tax rate in furtherance of the State's obligation to fund education than others." Id. at 902. Thus, the Court held that the "special abatement" scheme violated Part II, Article 5 of the New Hampshire Constitution "and the express language of Claremont II." Id.

In Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), supra, the Supreme Court considered the constitutionality of a provision for "phasing-in" the statewide property tax. Under this provision, during the first five tax years, each municipality, in which the education property tax exceeded the amount necessary to fund an adequate education, was required to remit an increasing percentage of such excess in each year, beginning at 10 percent of the excess for the first tax year and attaining 100 percent of the excess in tax year 2004. See Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 213. The Court found that "[t]he practical effect of this phase-in is that in fifty 'property rich' towns across the State, the full rate . . . per thousand is imposed gradually over five years, while taxpayers in the remaining towns pay the full rate immediately." Id. (citation omitted).

The State, in that case, urged that the phase-in could be "viewed as a partial abatement of an overall tax liability, or as a partial exemption of a portion of the value of the real property taxable in donor towns." Id. However, the Court held that the phase-in could not "constitute an abatement because it d[id] not limit tax relief to 'persons aggrieved' by the assessment of a tax." Id. (citation omitted). The Court next examined the constitutionality of the phase-in as a tax exemption. "[A] legislative exemption of a certain class of property from taxation, in whole or in part, provided the exemption serves the general welfare" is not unconstitutional. Id. (citation omitted). "If there is a just reason for the classification of taxable property, and the proposed selection is not arbitrarily made for the sole purpose of preferring some taxpayers to others, it will be upheld." Id. (citations omitted). The Court found that it could not be constitutionally valid as a tax exemption because "[t]he classification created by the phase-in encompasses taxpayers who do not merit special tax treatment in accordance with the just reasons offered by the [L]egislature." Id. at 216.

In this case, prior to HB 616, each town received the majority of the total cost of providing an adequate education from the statewide property tax. If the amount raised by that tax exceeded its cost of adequacy, then the municipality remitted the excess statewide property tax revenue to the State to be added to the education trust fund. See RSA 198:39, I(g), :46; see also Resp't's Ex. I at p. 1. If a municipality was not able to raise the full amount of its cost of an adequate education through the statewide property tax, then that municipality received an additional grant from the State. That grant included the excess statewide property tax revenues paid into the fund by the so-

called "donor towns" as well as other sources of State funding. See Sirrell v. State, 146 N.H. 364, 367 (2001) (outlining portions of the prior education funding statutory scheme). For example, in the 2000 tax year, while approximately 95 percent of the total amount of the statewide property tax raised was retained by the municipalities that raised it, the balance, an amount of $24 million, was placed in the education trust fund, and was used to fund the additional aid sent to the "receiving towns" who were unable to raise the full amount of their cost of an adequate education. See id. at 367-68. The excess proceeds of the statewide property tax comprised approximately 6 percent of the total funds in the education trust fund. See id.

Under HB 616, in addition to grant payments from the State, municipalities turn over to the school district the revenue raised by the statewide enhanced education tax. See Resp't's Ex. I at p.3. The municipalities are not required to remit any of the SEET revenue to the education fund unless the SEET to be raised by the municipality for fiscal year 2006 exceeds the amount taxpayers spent in fiscal year 2003 through the combined payments of state and local educational property taxes. See 198:41, II, :46; see also Resp't's Ex. I at p.3. In fact, for fiscal year 2006, only three towns will remit excess SEET revenue to the education fund. See Resp't's Ex. B.

The State argues that "[t]he transition grants relate only to the State aid allocations, and in no way affect the statewide tax rate, the assessment of that rate on the municipalities, or the amount of revenue raised by the statewide tax." Resp't's Trial Mem. at p. 11. Thus, according to the State, because every year, under RSA 76:3, the statewide enhanced education tax is set at a level sufficient to generate revenue of

$363,000,000.00, this rate is proportional across the State and, thus, does not violate Part II, Article 5 of the New Hampshire Constitution. See id.

The Court finds that the State is incorrect in its assertion that transition grants do not result in disproportional tax rates across the State. The "special abatement" and phase-in provisions of earlier proposed legislation were determined to be unconstitutional because they permitted the municipality to avoid payment of that amount of the statewide education property tax which exceeded the amount necessary to provide an "adequate education." See Opinion of the Justices (School Financing), 142 N.H. at 902; Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 213. The phase-in provision directed a municipality to collect and remit to the State only a proportion of the amount by which the education property tax exceeded the amount necessary to fund an adequate education. Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 213. Therefore, as discussed in Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), supra, the practical effect of the "special abatement" and phase-in was that in many of the "property-rich" towns across the State, the full tax due was not imposed while taxpayers in the remaining municipalities were required to pay the full rate without any abatement or phase-in.

Under HB 616, the State aid grants are only paid to those municipalities whose equalized valuation rates per pupil are below the State average. See RSA 198:40-a, b, c. It is clear that the amount of these grants will generally be unavailable or available in lesser amounts to the so-called "property rich" municipalities. For the fiscal year

beginning July 1, 2005, transition grants are given to those municipalities with an education grant, as determined by adding the total amount of State aid grants, less than 85 percent of the education grant determined for the prior fiscal year. As a result, it is to be expected that many of the "property-rich" municipalities, receiving little or no State aid grants, would have an education grant less than 85 percent of the education grant for the prior fiscal year and thus, would receive a transition grant. See Resp't's Ex. B, column entitled "Transition to Reach 85% of FY05 Grant." The realistic effect of the receipt of these transitions grants by the "property rich" municipalities is to permit these municipalities to use less of the statewide enhanced education tax assessment revenues collected and retained from SEET to provide an adequate education for their children. Consequently, as a practical matter, in these municipalities, taxpayers are, for all intents and purposes, not paying the full SEET tax rate. Whereas in the "property-poor" or less "property-rich" municipalities, the receipt of greater amounts of State aid results in their receiving less of or no transition aid, and thus, in effect, paying the actual SEET rate, or an effective rate higher than the "property-rich" municipalities. Thus, similar to the phase-in, the Court finds that "[t]he classification created by the [transition grants] encompasses taxpayers who do not merit special tax treatment … ." Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 216.

The relationship between the receipt of transition grants and a municipality's SEET tax revenues is perhaps not as direct as appears in the cases of the proposed "special abatement" and phase-in of the statewide property tax, but the practical effect is sufficiently similar as to render the transition grants unconstitutional. It must also be

recognized that this sleight-of-hand is possible only because the Legislature has failed to determine the cost of an adequate education. Without this benchmark, it is not as easy to identify the effect on the SEET tax rate in the "property-rich" municipalities. Furthermore, the Court notes that the temporary nature of the transition grants does not render them constitutional.

> [T]here is nothing permanent about any piece of legislation; its terms and conditions are subject to change at the will of the political process. The constitution, on the other hand, contains core principles that remain constant over time upon which our State is founded. At their heart is the principle that taxes be no less than fair, proportional, and reasonable.

Id. at 219 (quotation and citation omitted).

Accordingly, for the reasons stated above, as a result of the transition grants, SEET is effectively not administered in a manner that is uniform in rate throughout the State and therefore, violates Part II, Article 5 of the New Hampshire Constitution.

Determination of Aid

The City claims that the use of three year old data to determine the amount of aid to be received by municipalities is arbitrary and capricious and thus, unconstitutional. The City also claims that the use of fiscal year 2002 date to compute the equalized valuation with utilities is not only arbitrary and capricious, but is not permitted by the express terms of the statute. The State argues that the use of fiscal year 2003 and fiscal year 2002 data is not only reasonable but necessary, and is permitted under the express terms of the statute.

"In any statutory interpretation case, [the Court] determine[s] the legislature's intent by turning first to the language in the statute itself." Kaplan v. Booth Creek Ski

Group, 147 N.H. 202, 204 (2001) (citation omitted). In its analysis, the Court focuses "on the statute as a whole, not on isolated words or phrases." Id. (quotation and citation omitted). The Court will examine "the plain meaning of the words used in the statute" and will "consider legislative history only if the statutory language is ambiguous." Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005) (citations omitted).

The City claims that the use of 2002 data to calculate the "equalized valuation including utilities" in determining local tax capacity aid is not permitted by the express terms of the statute. Local tax capacity aid is calculated using the "equalized valuation including utilities." RSA 198:40-a. RSA 198:38 X (Supp. 2005) defines "equalized valuation including utilities" as "equalized valuation including properties subject to taxation under RSA 82 and RSA 83-F, as determined by the department of revenue administration, that was the basis for the local tax assessment in the determination year." The "determination year" is defined as "the fiscal year that was 3 years prior to the fiscal year for which aid is to be determined. Unless otherwise indicated, determination year data shall be used to calculate aid." RSA 198:38, IV (Supp. 2005). The City argues that the appropriate fiscal year to be used to calculate the equalized valuation including utilities is the determination year, which by definition would be fiscal year 2003 for determination of aid for fiscal year 2006. However, the City has misconstrued the plain meaning of the words of the statute.

Under section X, the "equalized valuation including utilities" is not to be calculated by use of the determination year but by the year "that was the basis for the local tax assessment in the determination year." RSA 198:38, X. At the hearing, Sallie

Fellows ("Ms. Fellows") from the Bureau of Information Services at the New Hampshire Department of Education explained that the year that was the basis for the local tax assessment in 2003 was April 1, 2002. It is inevitable that confusion would develop due to the distinction between the school fiscal year and the municipal tax year. As explained by Barbara Robinson ("Ms. Robinson") from the Department of Revenue Municipal Services Division, the school fiscal year runs from July 1 to June 30 of each year. See also RSA 197:1 (1999). The municipal tax year runs from April 1 to March 31 of each year. RSA 76:2 (2003). A town's fiscal year runs from January 1 to December 31.

Fiscal year 2006 for the school districts began on July 1, 2005 and will end on June 30, 2006. The determination year which is three years prior to the school district fiscal year 2006 is fiscal year 2003, which ran from July 1, 2002 to June 30, 2003. The statute designates that the equalized valuation with utilities to be used for determining aid in fiscal year 2006 is the equalized valuation that was the basis for the local tax assessment in the determination year, fiscal year 2003. The equalized valuation which was of necessity used as the basis for the taxes assessed for fiscal year 2003 was April 1, 2002. It would not be possible to utilize the equalized valuation from April 1, 2003 as the basis for the tax assessed in fiscal year 2003. Therefore, the use of the "equalized valuation including utilities" as determined on April 1, 2002, is consistent with the requirements of the statute.

Similarly, the use of the equalized valuation rate as determined on April 1, 2003 for calculating statewide enhanced education tax capacity aid is consistent with the

requirements of the statute. The statute determines statewide enhanced education tax capacity using the "adjusted equalized valuation excluding utilities." RSA 198:40-c. "Adjusted equalized valuation excluding utilities" is defined as the "equalized valuation as determined by the department of revenue administration pursuant to RSA 76:8 for April 1 of the fiscal year 2 years prior to the fiscal year for which aid is to be determined." RSA 198:38, XI (Supp. 2005). Thus, when determining aid for fiscal year 2006, the fiscal year that was two years prior was fiscal year July 1, 2003 to June 30, 2004. Under RSA 76:8, I (Supp. 2005), the tax base is determined by the equalized values from the preceding year. As stated previously, the tax year runs from April 1 to March 31 of each year. Therefore, in accordance with RSA 76:8, the equalized valuation to be utilized is that determined as of April 1, 2003. The State's determination of "adjusted equalized valuation excluding utilities" is consistent with that required by the statute.

The City further argues that the use of valuation data from three years prior to the fiscal year for which valuation data are being determined, and the use of different dates for determining the valuations for local tax capacity aid and statewide enhanced education tax capacity aid, are arbitrary and capricious and thus, render the statute unconstitutional. The State moved for a directed verdict on this claim because the City presented no evidence other than the use of different valuation dates and the fact that the use of such dates resulted in less local tax capacity aid for the City.

Preliminarily, the Court notes that the City has failed to articulate the proper standard of review for the Court to apply in its analysis of this claim. The City asserts

that the use of three-year-old data, and the use of different valuation dates for local tax capacity aid and statewide enhanced education tax capacity aid, are arbitrary and capricious. Based upon this assertion, it is the Court's understanding that this argument is essentially one of substantive due process.

"Since 1937, the due process clause has been used to protect substantive rights which are fundamental to notions of ordered liberty, which belong … to the citizens of all free governments … ." State v. Farrow, 118 N.H. 296, 301 (1978) (quotations and citations omitted) (analyzing whether the right to parole is a substantive due process right).

> Where the government seeks to deprive persons of fundamental rights it must prove to the Court that the law is necessary to promote a compelling or overriding interest. Where no such right is restricted, the law need only rationally relate to any legitimate end of government. As long as there is any conceivable basis for finding such a rational relationship the law will be upheld. Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee.

JOHN E. NOWAK, RONALD D. ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW 410 (West Publ'g Co. 1978).

As discussed above, the New Hampshire Supreme Court has determined that "a constitutionally adequate public education is a fundamental right." Claremont II, 142 N.H. at 473. "When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny." Id. at 472. Under this standard, the Court must find "a compelling state interest to sustain the legislation." Id. (quotation and citation omitted). Thus, in this case, the Court must determine whether the State has demonstrated "that the statute serves a compelling state interest, and that

the [S]tate's objectives could not be achieved by any less restrictive measures." 16A AM. JUR. 2D CONSTITUTIONAL LAW, § 387 (1998).

With respect to the use of valuation data from three years prior to the fiscal year for which valuation data are being determined, Ms. Fellows explained that the average daily membership in residence is defined as a count of students for which each town is financially responsible for providing an education. She testified that the count is a full time equivalent count which means that, for example, if a student resided in a town for only half of any given school year, he would be counted in the average daily membership in residence number as a .5. The average daily membership in residence numbers are used, among other things, to determine the amount of aid school districts will receive.

Ms. Fellows testified that the school districts initially report their numbers to the Department of Education by August 1. The Department of Education's verification process is then completed by late December or early January of the following year. Subsequently, the Department of Education is required to publish the grant and statewide property tax amounts for each community on November 15th, approximately eight months prior to the beginning of the fiscal year.

For example, in the 2002-2003 school year, the average daily membership in residence numbers were reported by the school districts to the Department of Education by September 1, 2003.[1] See Resp't's Ex. H (City of Nashua's average daily

[1] As noted above, Ms. Fellows explained that currently this information is due to the Department of Education by August 1, however, for fiscal year 2002-2003 the due date was September 1.

membership in residence numbers for fiscal year 2002-2003). The Department of Education's verification process would then have been completed by late December of 2003 or early January of 2004. Subsequently, the Department of Education published the grant and statewide property tax amounts for each community on November 15, 2004, approximately eight months prior to fiscal year 2006, which began on July 1, 2005. Thus, for fiscal year 2006, the only data set available to calculate education aid, would be that from three years prior, fiscal year 2002-2003. Ms. Fellows further testified that the Legislature uses a data set from one determination year rather than from several different years in order to keep the numbers consistent.

The Court finds that the State has satisfied its burden of demonstrating a compelling state interest in using three-year-old valuation data as the determination year for the fiscal year in which aid is being determined. It is clear from Ms. Fellows testimony that, as a result of the length of time it takes to finalize and certify the figures, the most recent and accurate data set for use would be that from three years prior to the year for which aid is being determined. It is only logical that the Legislature, and for that matter, the citizens of this State, would seek to use the most recent and accurate information in determining education aid amounts. Accordingly, the Court finds and rules that the use of three-year-old data, pursuant to RSA 198:38, IV, as the determination year is not unconstitutional.

However, the Court finds and rules that the State has failed to meet its burden of demonstrating a compelling state interest for the use of different dates for determining the valuations for local tax capacity aid and statewide enhanced education tax capacity

aid. As discussed above, in calculating "equalized valuation including utilities," the State utilizes 2002 data. Whereas, in calculating "adjusted equalized valuation excluding utilities," the State employs 2003 data.

Ms. Fellows testified that the process for calculating equalized valuations is lengthy. As a result, the preliminary equalized valuation numbers for a particular year are released approximately one year later and thereafter, changes are made to the numbers. With respect to "equalized valuation including utilities," Ms. Fellows explained that if there is even one change made to any of the numbers for one town, such a change would modify the State average which would result in an adjustment to the amount of State aid distributed to every town that receives local tax capacity aid from the State under HB 616. However, as to "adjusted equalized valuation excluding utilities," Ms. Fellows testified that a change to the equalized valuation for one town would only change the statewide property tax assessment for that town. She stated that, as a result, the Legislature could utilize more recent data for its calculation of "adjusted equalized valuation excluding utilities." The State argues that this distinction supports the use of two different valuation dates in the statute.

While the Court understands the explanation given by Ms. Fellows as to the effect of one change on the "equalized valuation including utilities," the Court finds that such explanation does not constitute a compelling State interest in using two different dates for equalized valuation with and without utilities. Rather, it merely provided an explanation as to the effect of changing one town's numbers on the "equalized valuation including utilities." For fiscal year 2006 aid determination, the State presented no

evidence indicating that the data from 2003 could not be used in the calculation of "equalized valuation including utilities." It is the Court's understanding that such data would have been available to the State given that it was used in the calculation of the "adjusted equalized valuation excluding utilities." Moreover, Ms. Fellows testified about the importance of using a completed set of data for all calculations. Thus, it follows, that if the 2003 data set information was available to the State for "adjusted equalized valuation excluding utilities," conceivably such information was available for "equalized valuation including utilities."

Furthermore, even were the Court to assume that the rational basis standard of review was applicable to this issue, the Court finds the use of two different dates for equalized valuation with and without utilities does not comport with substantive due process guarantees. Under the rational basis standard of review,

> [a] statute or municipal ordinance is arbitrary and capricious, and hence is constitutionally invalid as transgressing due process requirements, if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest; however, if any conceivable legitimate governmental interest supports the ordinance, that measure is not arbitrary and capricious and hence cannot offend substantive due process norms.

16B AM. JUR. 2D CONSTITUTIONAL LAW, § 916 (1998); see also LeClair v. LeClair, 137 N.H. 213, 223 (1993) (discussing use of the rational basis test in an equal protection claim and stating that the rational basis test presumes the regulation is valid, and upholds the regulation if it is rationally related to a legitimate state interest).

The Court finds that there is no evidence that the use of two different dates for equalized valuation in the statute is rationally related to a legitimate state interest.

Simply taking the statute on its face, the use of two different dates for equalized valuation with and without utilities is arbitrary and capricious. There is no evidence as to any legitimate interest the State had which would relate to the use of two different dates. Accordingly, the Court finds that no matter which standard of review is applied, the use of two different dates for equalized valuation with and without utilities is unconstitutional.

House Bill 616 As Applied to the City of Nashua

Finally, the City claims that HB 616 is unconstitutional as it applies to the City of Nashua because it does not fully fund an adequate education. The City was provided approximately 60.7 percent of the actual cost of operating the City of Nashua schools in fiscal year 2006. See Resp't's Ex. J. The City maintains that because it will receive less State aid in fiscal year 2006 than it did in fiscal year 2005 this amount does not provide an adequate education.

> In order to seek a Declaratory Judgment as to a present or equitable right,
>
> [t]he adverse claim involved must be definite and concrete touching the legal relations of parties having adverse interests. It cannot be used on a hypothetical state of facts. Furthermore the controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character. The adverse claim alleged must not constitute a demand for advice as to future cases.

Wuelper v. University of N.H., 112 N.H. 471, 473-74 (1972) (citations omitted).

Here, the Court finds that this issue cannot be decided until the State determines the cost of an adequate education. As discussed above, the State has failed to determine the cost of an adequate education. It is not until such a determination is

made by the State that the Court can ascertain whether the State has funded an adequate education for the City of Nashua. Thus, the Court is unable to rule on this issue at this time because "an intelligent and useful decision [cannot] [] be made through a decree of a conclusive character." Id. (citations omitted). Accordingly, the Court declines to rule on this claim as it is not justiciable at this time.

Conclusion

For the foregoing reasons, the Court GRANTS the petition in part and, as made clear above, finds HB 616 unconstitutional.

So ordered.

March 8, 2006

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WILLIAM J. GROFF,
Presiding Justice